STATE OF MICHIGAN

IN THE SUPREME COURT

DENISHIO JOHNSON,

Plaintiff-Appellant.

v

CURT VANDERKOOI, ELLIOT BARGAS, and CITY OF GRAND RAPIDS,

Defendants-Appellees.

Supreme Court No. 156057
Court of Appeals No. 330536
Lower Court No. 14-007226-NO

KEYON HARRISON,

Plaintiff-Appellant.

v

CURT VANDERKOOI and CITY OF GRAND RAPIDS,

Defendants-Appellees.

Supreme Court No. 156058
Court of Appeals No. 330537
Lower Court No. 14-002166-NO

DEFENDANTS' ANSWER IN OPPOSITION TO PLAINTIFFS' JOINT APPLICATION FOR LEAVE TO APPEAL

Elliot J. Gruszka (P77117)
Assistant City Attorneys
Counsel of Record for
Defendants-Appellees
300 Monroe Avenue, NW, Suite 620
Grand Rapids, MI 49503
(616) 456-3181

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COUNTERSTATEMENT OF APPELLATE JURISDICTION

Appellees accept Appellants' statement of appellate jurisdiction.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. To establish *Monell* liability under a custom a plaintiff must show that a constitutional injury results whenever the custom is applied. The United States Supreme Court has declined to hold that fingerprinting during a *Terry* stop violates the Fourth Amendment in all circumstances. Does the City's custom of taking fingerprints during a *Terry* stop, when the officer determines that doing so will confirm or dispel his reasonable suspicion, cause a constitutional injury whenever it is applied?

Defendants-Appellees answer:	No.
Plaintiffs-Appellants answer:	Yes.
Court of Appeals answers:	No.
Kent County Circuit Court answers:	No.

II. State courts are not permitted to interpret the federal constitution to provide broader protections or restrictions when the United States Supreme Court has refrained from doing so. For more than fifty years, the United States Supreme Court has declined to hold that fingerprinting is a Fourth Amendment search. Is this Court permitted to hold for the first time that fingerprinting is a search under the Fourth Amendment to the United States Constitution?

Defendants-Appellees answer:	No.
Plaintiffs-Appellants answer:	Yes.
Court of Appeals answers:	Did not address this issue.
Kent County Circuit Court answers:	Did not address this issue.

REASONS THE COURT SHOULD DENY THE APPLICATION

A party seeking leave to appeal to this Court must, under MCR 7.305(A)(1)(e) "*establish*[] a ground for the application" under MCR 7.305(B). The only grounds that could apply to this case are:

* * *

(2) the issue has significant public interest and the case is … against the state or one … of its subdivisions …

* * *

(5) in an appeal of a decision of the Court of Appeals,

(a) the decision is clearly erroneous and will cause material injustice, or

(b) the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals …

* * *

MCR 7.305(B). Appellants identified no conflict between the Court of Appeals decisions in this case and decisions of this Court or the Court of Appeals, so review under subrule (B)(5)(b) is unavailable.[1] This case does not involve "a legal principle of major significance to the state's jurisprudence" because all of the issues involve questions of federal, not state, law. MCR 7.305(B)(3). All other grounds of subrule (B) are facially inapplicable, leaving subrule (2) and (5)(a).

Appellants have proposed four issues for this Court's review that are fairly summarized as follows:

[1] All citations of state cases in Appellants'application are to highlight propositions of law Appellants believe support their position, not to point out holdings contrary to the holdings below.

(1) Does the Court of Appeals holding improperly redefine *Monell* liability such that a municipality can avoid liability for their unconstitutional policies by making those policies discretionary?

(2) Is fingerprinting a search under the Fourth Amendment?

(3) Does fingerprinting exceed the scope of a *Terry* stop?

(4) Did Harrison consent to being fingerprinted?

Review should be denied in these combined cases for the following reasons.

As to Issue (1), Appellants interpretation of the applicability of the Court of Appeals' holding on their *Monell* claims to other cases is faulty and the Court of Appeals came to the correct conclusion under binding authority. There is no significant public interest in this issue because Appellants' contention that the Court of Appeals created a loophole for municipal liability is incorrect. The holding is also not clearly erroneous and does not work a material injustice against Appellants. Therefore review by this Court of the *Monell* issue is not warranted.

Issues (2) and (3) present novel questions of federal constitutional law. An entire section of Appellants' brief details the United States Supreme Court's restraint in answering whether the Fourth Amendment bars warrantless fingerprinting on less than probable cause. This question remains unanswered in the federal courts. "In interpreting the *federal* constitution, state courts are not privileged to provide greater protections or restrictions when the Supreme Court of the United States has refrained from doing so." *J & J Const Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722, 731 n.9; 664 NW2d 728, 733 (2003), citing *Arkansas v Sullivan,* 532 US 769, 772; 121 S Ct 1876; 149 L Ed 2d 994 (2001) (emphasis in original). Because the United States Supreme Court has "refrained" from

providing the "greater protection[]" of holding that fingerprinting is a search subject to the Fourth Amendment, this Court is not permitted to so hold.

Finally, this is a Court of last resort dedicated to deciding issues affecting law, policy, the State and its subdivisions, other litigants, and the general public—not an error-correcting court. MCR 7.305(B); s*ee also, e.g.*, *People v Shaw*, 500 Mich 941; 891 NW2d 226, 228 (2017) ("Typically, this Court refrains from engaging in error correction"). Resolution of Issue (4) can and would only affect Appellant Harrison—and no one else. Harrison only argues that the Court of Appeals *misapplied* the law to the facts of his case, not the outcome was clearly erroneous. Moreover, Harrison states that in his mind "significant fact issues" exist with regard to consent. These alleged fact issues would make this case a poor vehicle for deciding *any* issue of significant public interest, even if Harrison had identified one. Because Appellants have not challenged the application of qualified immunity to the individual defendants and because—as the Court of Appeals correctly concluded and as argued below—there is no municipal liability, resolution of the issue of consent cannot affect the outcome of this case.

A party seeking leave to appeal from this Court must *establish* that one of the grounds of MCR 7.305(B) applies to the case, not merely list which grounds it hopes apply. For the foregoing reasons, and as argued below, Appellants have failed to establish *any* ground for this Court's review. Therefore this Court should deny the application for leave to appeal and affirm the decisions of the Michigan Court of Appeals.

COUNTERSTATEMENT OF FACTS AND PROCEEDINGS

I. Photograph and Fingerprinting of Keyon Harrison

On May 31, 2012, at about the time school lets out, Appellee Curt VanderKooi was westbound on Lake Drive, headed to his office at police headquarters. (VanderKooi, 6)[2]. He was outside his service area at the time, driving an unmarked police cruiser and was not in uniform. (Harrison, 12, 15–16, 18.)

Appellant Keyon Harrison was walking home from school along Fulton Street, when he saw schoolmate Pablo Aguilar on his bike struggling with items he was carrying. Harrison helped Aguilar by taking a large toy firetruck from him and walking along his bike as they headed east on Fulton. After the boys crossed Union Street, Harrison handed the object back to Pablo and the two parted ways. (*Id*. 12–14.)

While stopped at a red light on Lake at Fulton, VanderKooi saw two individuals on the sidewalk at the northeast corner of Fulton Avenue and Union Street. (VanderKooi, 7–8.) The individual on foot was holding a large object that looked to be an ornamental object of value (*Id*. 7.) The individual on foot walked up to an individual on a bicycle.

VanderKooi decided to watch what was going on. (*Id.* 8.) He turned right onto Fulton and began heading eastbound. In a matter of seconds VanderKooi saw Harrison hand the object to Aguilar, who rode away. VanderKooi arrived at the next street, Packard, and turned right, losing sight of the two. (*Id*. 9.) He took another right at the next street, which was Lake Drive again, and began to head back to the intersection where he first saw the individuals. (*Id*.)

[2] All referenced exhibits cited in section I were originally attached to Defendants' motions for summary disposition in *Harrison v. VanderKooi, et al.*, Lower Court No. 14-002166-NO unless otherwise noted.

Harrison continued to walk along Lake Drive, when he saw an injured bird in a park. Harrison followed the bird by kneeling down by it, then walking around it in circles, until he decided to leave it alone. (Harrison, 15.) While driving on Lake, VanderKooi saw Harrison in a park area near some brush. (VanderKooi, 10.) VanderKooi parked his car and saw Harrison crouched with his back to VanderKooi, moving his arms around a bit. (*Id.* 12–13.) Based on the prior activity with the object and now seeing Harrison secluded in the park, VanderKooi thought the situation warranted further investigation. (*Id.* 13.)

Harrison stood back up, walked twenty feet, and encountered VanderKooi in an unmarked, tan Crown Victoria. (Harrison, 15-16; *Id.* 64.) VanderKooi got out of his car and asked if he could speak to Harrison. (Harrison, 15.) Harrison said, "Sure." (*Id.* 16.) VanderKooi identified himself and asked Harrison what he was doing. (VanderKooi, 13–14.) VanderKooi told Harrison that he saw Harrison carrying a firetruck and thought he was trying to sell the friend something. (Harrison, 16–17; *Id.* 14.)

Harrison replied he was helping Aguilar carry an internship project home. (Harrison, 17; VanderKooi, 13–14, 18.) Harrison also told VanderKooi that he was trying to catch birds. (VanderKooi, 13–14; Nagtzaam, 15; Newton, 11.) VanderKooi was aware of many larcenies and home invasions in that area after school, so he was suspicious that Harrison's explanation was not entirely truthful. (VanderKooi, 14–15.) VanderKooi did not see a bird. (*Id.* 16.) Harrison was wearing a black hooded sweatshirt over his school uniform polo, khakis, loafers, and had a sports bag on his back. (Harrison, 18, 27–28.) VanderKooi did not notice that this was a school uniform, but did notice his knapsack. (VanderKooi, 18; see also Ex B.)

VanderKooi told Harrison to hold on. Harrison waited. VanderKooi called for backup. (Harrison, 17.) They waited about two minutes, then a uniformed officer arrived. (*Id.* 18–19; LaBrecque, 6, 21.) VanderKooi used his radio again to send another officer to locate Aguilar. (Harrison, 19; VanderKooi, 17, 27.) VanderKooi told Harrison that he was doing this to make sure their stories were the same. (Harrison, 19; Nagtzaam, 16–17; Newton, 5-6, 8–11.) VanderKooi and Harrison waited for about four minutes, talking idly. (Harrison, 20–21; VanderKooi, 22; Nagtzaam, 7.)

VanderKooi was calm and collected. (Harrison, 21.) The interaction was low key and non-confrontational. (Nagtzaam, 24, 17–18.) VanderKooi asked to search Harrison because he suspected contraband. (VanderKooi, 17, 18, 19.) Harrison said yes. (Harrison, 22.) VanderKooi told other officers that he had consent. (VanderKooi, 19.) VanderKooi asked again if he could search Harrison's bag. (Harrison, 26.) Harrison states the "the gray-haired officer" (LaBrecque) searched his bag. (*Id.* 28-29.) But VanderKooi says he asked Harrison to open up his knapsack, which Harrison did, and he looked inside. (VanderKooi, 20.) A younger officer (Nagtzaam) arrived and asked if he could search Harrison. Harrison said yes, so the officer searched him. (Harrison, 22; Nagtzaam, 9-10, 13–14.)

VanderKooi asked if Harrison had identification on him: he did not. (Harrison, 30.) VanderKooi told Harrison that in order to identify him, VanderKooi would have to take his picture. (*Id.* 30, 35.) Harrison replied, "did I do something illegal?" (*Id.* 30.) VanderKooi responded that the photo was to identify him (Harrison, 30; VanderKooi, 25, 65–67.) Harrison said, "okay," in a nervous, shaky voice. VanderKooi remained calm and collected. (Harrison, 31.)

Nagtzaam and LaBrecque arrived and LaBrecque took Harrison's picture as Nagtzaam made conversation with Harrison. (Harrison, 31–33; VanderKooi, 20–21; LaBrecque, 7–8; Nagtzaam, 11.) During this time, VanderKooi learned that an officer found Aguilar but he did not have the object. (VanderKooi, 21, 24–25; Newton, 8-10, 16.)

Harrison asked VanderKooi if there was anything else he wanted to know. VanderKooi told him that they needed to take his fingerprint. (Harrison, 33.) Harrison asked, "why?" VanderKooi responded: "just to clarify again to make sure you are who you say you are." Harrison said, "okay." (*Id.* 34.) LaBrecque took a print of Harrison's right thumb. (*Id.* 36-38; LaBrecque, 8–9; Ex C.) The process took no longer than two minutes. (Harrison, 38; LaBrecque, 10.)

Nagtzaam wrote an incident report. (Nagtzaam, 14, 19–20; Ex A.) LaBrecque uploaded the picture into the GRPD's electronic record system. (LaBrecque, 10–12; Ex D, Resp 4.) LaBrecque turned in the print card at the end of his shift. (LaBrecque, 13–14.) A Latent Print Examiner checked Harrison's thumbprint against the Kent County Correctional Facility's database and then the Automated Fingerprint Identification System ("AFIS".) The searches were nil. (Ex Z, Resp 5-7.) The print card resides in a box in the GRPD Latent Print Unit office. (Ex K, Resp #15.)

II. Photograph and Fingerprinting of Denishio Johnson

In 2011, the Michigan Athletic Club (MAC) was located at 2500 Burton SE Grand Rapids. The business had problems with theft from vehicles in its parking. GRPD officers that were assigned to patrol the area were well aware of these problems, as their captain,

VanderKooi, disseminated emails about this and other crime trends in "the East Edge." (Ex I, Bargas, 31; Ex L.)[3]

On August 15, 2011, at 1:40 p.m., the GRPD received a call from an employee of the MAC, stating that she saw someone looking into cars in the parking lot as if to steal something from them. She described the suspect as a black male, approximately twenty years old, wearing a red jacket and blue jeans. (Ex A; Ex M; Compl ¶ 11.) The parking lot had many cars in it at the time but was not full. (Johnson, 11.)

GRPD Officers Edgcombe and Laudenslager were dispatched to the call. Edgecombe was aware of several break-ins and thefts from vehicles located in the MAC parking lot. Some of the suspects in those prior incidents were described as young, black males who, after breaking and entering into the vehicles, would exit by walking over the berm behind the MAC. (Ex E, Resp #4; Ex M.)

Upon arrival, Edgcombe spoke with the MAC employee. She said the person she saw walked westbound on Burton Street. (Ex A; Ex E.) Edgecombe searched the immediate area and located a person fitting the dispatched description sitting on a grassy hill west of the MAC. (Ex A; Ex E; Johnson, 6-7; Compl ¶ 9.) Edgecombe contacted the subject and asked him about walking through the MAC parking lot looking into cars. (Johnson, 10–11.) Edgecombe also asked for his name and date of birth because he did not have identification. (Johnson, 9, 19–20.) He identified himself as Denishio Johnson with a date of birth that would have made him fifteen years old. (Ex A.)

[3] Unless otherwise noted, all referenced exhibits in Sections II and III were attached to Defendants' motions for summary disposition in *Johnson v VanderKooi, et al*. No. 14-007226-NO

Johnson told Edgecombe that he was waiting for a friend and had walked through the MAC parking lot from his home on Burning Tree, a street located behind the MAC on the other side of the berm. Edgcombe thought that his route was consistent with the route traveled by suspects of the prior vehicle break-ins. Johnson denied trying to open any vehicles. (Ex A; Ex E; Johnson 8, 11.)

Appellee Elliott Bargas, a patrol supervisor in the area, heard "a dispatch call, radio traffic of the witness seeing a subject in the MAC lot. . . . They were described as trespassing and looking into cars. That same witness provides clothing description, physical description, gender description and race." (Bargas, 4–5, 7.) Bargas heard dispatch describe a suspect "as a late teens black male wearing red over jeans." (*Id*. 6.) He heard Edgcombe announce over the radio that he saw someone matching that description and that he was making contact. Bargas started driving in that direction, also aware of several incidents of previous burglaries from vehicles in this lot and that a suspect of a prior incident was seen leaving the parking lot and walking south over the berm. (*Id*. 6, 7, 12–13; Ex L.)

Back at the MAC parking lot, Laudenslager spoke to a male witness who had seen the same suspicious activity as the MAC employee. The witness identified Johnson as the person he saw walking through the MAC parking lot, but he did not see him trying to use the vehicle door handles or otherwise try to get into any vehicles. (Ex A, Ex E; Bargas, 8.)

Bargas arrived on scene after Edgcombe had detained Johnson and was trying to identify him. Edgecombe told Bargas Johnson is fifteen years old and lives on Burning Tree, just south of the MAC. (Bargas, 10; Johnson, 9.) Bargas spoke with Johnson, who admitted walking through the MAC parking lot, but denied looking into cars. (Bargas, 11, 32–33; Ex A.) Bargas thought Johnson appeared older than fifteen based on his stature and the fact

that he had tattoos on his arms. (Bargas, 11, 14, 21; Ex B.) He did not have any identification on him. (Bargas, 10, 17; Johnson, 9.)

After speaking with Johnson, Bargas took photographs of him using his department-issued digital camera. He also took a full set of fingerprints on a GRPD-issued "print card." (Bargas, 14–15, 22; Ex B; Ex C.) Johnson's mother was contacted and she came to the scene. (Ex A; Johnson, 11; Bargas, 16.) She showed the officers her identification, which showed she lived on Burning Tree. She confirmed the person the GRPD officers had stopped was her son, Denishio Johnson. Bargas explained the incident and their actions to her. (Ex E; Bargas, 16-18; Johnson, 13.) Johnson recalls being fingerprinted and photographed after the officers talked with his mother. (Johnson, 13–17.) Officers did not ask permission to do so. (*Id*. 17.) Johnson denied checking out cars, instead explaining that he was looking at his reflection in the windows. (*Id*. 11.) He left with his mother. No charges were filed. (Bargas, 34; *Id*. 17–18.)

Bargas uploaded the photos into the GRPD's records system and the print card was turned in at the end of Edgecombe's shift to the GRPD Forensics Services Unit. (Ex F, Resp #14; Bargas, 18-19, 26–27.)

III. Grand Rapids Police Department Custom or Practice of Photograph and Fingerprinting

The City has developed a custom, practice, or procedure referred to as "picture and print" or "P&P." A GRPD officer may take a photograph and fingerprint of an individual when the individual does not have identification on them and the officer is in the course of writing a civil infraction or appearance ticket. A photograph and print may also be taken in the course of a field interrogation (i.e., a citizen contact or a stop, depending on the circumstances), if appropriate, based on the facts and circumstances of that incident. (Ex Y;

see also Bargas 25, 30-31; VanderKooi 65-67.) P&P has been a practice of the GRPD for over thirty years. (VanderKooi, 36.)

There is no specific written policy on P&P, but references to the practice show up in the GRPD Manual of Procedures ("MOP").[4] The training documents also show how the practice has evolved. For example, when the practice was first implemented, officers took a Polaroid picture of a person and affixed a thumbprint to the back of the photo. (Ex Q.) By 2011, the GRPD used digital cameras. (Bargas, 18.)

Patrol sergeants are assigned a fingerprint kit and use a GRPD "print card." (Ex R.) When an officer fills out a print card, he will turn it in at the end of his shift to a "patrol work box" located in the GRPD headquarters. Print cards are collected from the patrol work box and placed into the Forensics mailbox. From there, the cards are submitted to the Latent Print Unit, a one-room, limited access office within the Forensic Services Unit. (Ex S, Resp 15.)

Latent Print Examiners check all the submitted fingerprints on P&P cards against the Kent County Correctional Facility database. If the person does not appear in the database, the print is searched against the known database (Automated Fingerprint Identification System, or "AFIS"). The goal remains to attempt to verify the information provided. The examiners will indicate on the card the results of their examination. (Ex C, Ex S; Ex Z,

[4] Ex O (Forensic Services Unit, MOP 3-12.1, duties include identifying field interrogation prints; Driver's License Violations, MOP 5-6.3 *et seq.*, directing officers to "P&P" in circumstances in which a person will be issued an appearance ticket in lieu of custodial arrest; Appearance Ticket violation, MOP 10-6.1 et seq., directing officers to "P&P" in circumstances in which a person may be issued a ticket in lieu of custodial arrest. The Field Interrogation chapter of the MOP that was effective in 2011 and 2012, however, does not contain a reference to P&P.)

Resp #1.) After the cards are processed by the Latent Print Examiners, they are filed and stored under their respective year, in a box.

IV. Procedural History

Appellants filed separate suits under 42 USC §§ 1981 and 1983 against the respective individual defendant officers, alleging that the P&P procedure violated their Fourth Amendment right against unreasonable searches, their Fifth Amendment rights against taking of private property without just compensation, their so-called constitutional right to privacy, and that the P&P was applied in a discriminatory manner in contravention of the Fourteenth Amendment. Appellants asserted the same violations as *Monell* claims against the City. The cases were joined for discovery.

In Harrison's case, VanderKooi moved for summary disposition under MCR 2.117(C)(7) and (C)(10), and the City moved for summary disposition under MCR 2.117(C)(10). Harrison also moved for partial summary judgment only on the Fourth Amendment issue, and abandoned his Equal Protection claim. In Johnson's case, Bargas and VanderKooi moved for summary disposition under MCR 2.117(C)(7) and (C)(10), and the City move for summary disposition under MCR 2.117(C)(10). In both cases, Appellees moved to strike Appellants' joint expert witness. The trial court granted Appellees' motions and denied Harrison's motion, holding that no constitutional violations occurred, and that even if they did, the individual officers were entitled to qualified immunity. The trial court further held that because no constitutional violations occurred, the City was not liable.

Appellants each appealed, and in separate opinions, the Michigan Court of Appeals affirmed the trial court. At trial and on appeal, Johnson attempted to broaden his Fourth Amendment claim beyond his complaint to include the scope of his stop, including the fact

that he was handcuffed and detained in the back of a police cruiser. The Court of Appeals held that Johnson had not sufficiently pleaded facts to show he was challenging the length or scope of his detention, and focused its Fourth Amendment analysis solely on the P&P. In both Johnson and Harrison, the court determined that fingerprinting was not clearly established as a Fourth Amendment search, and therefore the individual officers were entitled to qualified immunity. The court also concluded that neither plaintiff had presented evidence or authority to support their Fifth Amendment claims. Finally, the Court of Appeals concluded in each case that even if warrantless fingerprinting does violate the Fourth Amendment, the City's custom of providing officers with the ability to take fingerprints if appropriate, based on the facts and circumstances of the incident, during field interrogations because that custom did not cause the constitutional violation in this case. This application followed.

STANDARDS OF REVIEW

This Court reviews de novo a grand or denial of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law and requires consideration of all documentary evidence filed or submitted by the parties. MCR 2.116(G)(5); *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Id.*

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. The court considers affidavits, pleadings, depositions, admission, and other evidence

submitted by the parties in the light most favorable to the non-moving party. MCR 2.116(C)(10); *Maiden,* 461 Mich at 120.

ARGUMENT

I. The Court of Appeals correctly concluded that for *Monell* liability to exist, a custom or practice of the municipality must actually cause the constitutional injury.

The Court of Appeals analyzed Johnson's *Monell* claim in its published opinion (*Johnson*, ___ Mich App ___, slip op at *16–*20) and then adopted its own reasoning by reference in *Harrison*. (*Harrison*, slip op at *5) Citing binding Michigan and federal cases, the court held that for a municipality to liable, a plaintiff must show that an official policy or custom actually caused the constitutional injury. (*Johnson*, slip op at *17.) Looking to the evidence, the Court concluded that although the City had a custom of permitting P&Ps if appropriate, based on the facts and circumstances of the incident, during investigatory stops, there was no policy directing officers to take a P&P whenever a subject did not have identification. (*Id*. at *19.) The court further noted that the officers had articulated specific reasons for taking the P&Ps, which supported its conclusion that the City did not "direct" their actions for purposes of *Monell* analysis.

There are four generally recognized Avenues of pleading and proving a municipal liability claim. A plaintiff must show: "(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance [of] or acquiescence [to] federal rights violations." *D'Ambrosio v Marino*, 747 F3d 378, 386 (CA 6,, 2014) *cert denied* 135 S Ct 758; 190 L Ed 2d 628 (2014), quoting *Burgess v Fischer,* 735 F3d 462, 478 (CA 6,, 2013).

> Appellants have squarely limited the question on appeal to Avenue One.
>
> the custom and practice that [Appellants] challenge[] is not the taking of prints and pictures, generally, but the custom and practice of taking prints and pictures of innocent citizens. That is the custom and practice that the Defendant City of Grand Rapids has trained its workers to undertake and that is why this is not a failure to train case. The Defendant City of Grand Rapids has actually trained its officers to take the prints and pictures of innocent citizens as documented by the evidence in this case.

(Johnson Appellant Brief at 29; Harrison Appellant Brief at 42.)

> The City has admitted that the GRPD has a policy of fingerprinting and photographing individuals during many different kinds of police/citizen encounters, including *Terry* stops like those involved in these two cases. As a result, it is liable under 42 USC 1983 for violations of Harrison's and Johnson's Fourth Amendment rights.

(App for Leave at 17.)

> Here, the City's policy allows officers to engage in P&Ps during routine investigative stops absent probable cause, where the citizens are not arrested. As discussed below … this practice is unconstitutional under the U.S. Supreme Court's *Terry* jurisprudence.

(*Id*. at 24.)

Therefore, for the purposes of this application, Appellants claim of municipal liability must meet the strictures of Avenue One. Because the Court of Appeals correctly determined there was no municipal liability under Avenue One and because Appellants' assertion that the Court of Appeals created a loophole for municipal liability is incorrect, this Court should deny leave to appeal.

A. Implicit in Appellants' argument is the assertion that taking fingerprints during a *Terry* stop that does not lead to an arrest is always unconstitutional.

It is clear from the formulation of Appellants' arguments that whatever the specifics of the challenged custom are, whenever they are applied, they result in a constitutional

violation. The clearest statement comes not in the application for leave, but in the individual briefs filed in the Court of Appeals, stating identically in each:

> The Defendants/Appellees have admitted that the City has a custom and practice of police officers taking photographs and thumbprints, known as P&P, of individuals with whom they make contact in the course of a field interrogation or stop. The issue in this case is the *appropriateness of the taking of a photograph and print of innocent people*.
>
> * * *
>
> The Constitutional violations in this case were caused by the custom and practice, as it had become the regular procedure of the Department *to take pictures and prints of innocent pedestrians who do not happen to have ID on them.*

(Johnson App Br at 28; Harrison App Br at 40–41 (emphasis added).)

> The trial court commits error when it fails to recognize that the custom and practice that [Plaintiff/Appellant] challenges is not the taking of prints and pictures, generally, but the custom and practice of *taking prints and pictures of innocent citizens*.

(Johnson App Br at 29; Harrison App Br at 42 (emphasis added).)

In other words, Appellants argued below that it is always unconstitutional to take a P&P of an "innocent citizen" and that this unconstitutional custom and practice *caused* a constitutional injury *when applied* to Appellants.

This formulation of the issue suffers somewhat from the legal axiom that *all* persons with whom the police come in contact are *presumed* innocent, and thus the phrase "innocent person" has no legal meaning in a Fourth Amendment context. *Rawlings v Kentucky*, 448 US 98, 121; 100 S Ct 2556; 65 L Ed 2d 633 (1980) (Marshall, dissenting) ("it is easy to forget that the standards we announce determine what government conduct is reasonable in searches and seizures directed at persons who turn out to be innocent as well as those who are guilty.").

Appellants' new counsel wisely jettisons this formulation of the question presented, recasting it as a question of whether the City has a "practice or custom of fingerprinting and

photographing individuals during *Terry* stops." (App for Leave at 19.) "Here, the City's policy allows officers to engage in P&Ps during routine investigative stops absent probable cause, where the citizens are not arrested." (*Id.* at 24.)

Nevertheless, despite the loss of the phrase "innocent citizens," Appellants' theory of municipal liability can be fairly stated as follows: the custom of taking a P&P, if appropriate, based on the facts and circumstances of the incident, during an investigatory stop that does not lead to an arrest is *always* a Fourth Amendment violation, and that the existence of that custom *caused* Appellants' constitutional injury.

B. *Monell* and its progeny teach that for liability to attach to a municipality under Avenue One, the practice or custom must cause a constitutional injury whenever it is applied.

A municipality has no *respondeat superior* liability for unconstitutional conduct by its employees. *Monell v. Dep't of Social Services,* 436 US 658, 691; 98 S Ct 2018; 56 L Ed 2d 611 (1978). Municipal liability attaches only when a plaintiff can show that the deliberate conduct of the municipality was "the 'moving force' behind the injury alleged." *Bd of Co Com'rs of Bryan Co, Okl v Brown*, 520 US 397, 404; 117 S Ct 1382; 137 L Ed 2d 626 (1997). A plaintiff must demonstrate a "direct causal link between the municipal action and the deprivation of federal rights." *Id.*

"A city's custom … can be unconstitutional in two ways: 1) facially unconstitutional as written or articulated, or 2) facially constitutional but consistently implemented to result in constitutional violations with explicit or implicit ratification by city policymakers." *Gregory v City of Louisville*, 444 F3d 725, 752 (CA 6, 2006) (internal citation omitted). This formulation is essentially a restatement of Avenues One and Four. *D'Ambrosio*, 747 F3d at 346. Therefore, although there are avenues of liability where the custom or policy is not

facially unconstitutional—for instance Avenues Three and Four—under Avenue One, the custom or policy *must be so constitutionally repugnant that each time an agent of the municipality acts according to it, the result is inevitably a constitutional injury*.

This rule is consistent with the United States Supreme Court's decision in *City of Canton, Ohio v Harris*, 489 US 378; 109 S Ct 1197; 103 L Ed 2d 412 (1989), in which the Court "reject[ed the] petitioner's contention that only unconstitutional policies are actionable" under section 1983. *Id.* at 387. *Canton* was the first case to hold that a municipality can be liable under *Monell* if an employee applies a facially constitutional policy in an unconstitutional way as a result of inadequate training, which of course Avenue Three. *Id.* In this case, as noted above, Appellants have specifically disavowed a failure to train theory, arguing instead that the custom of conducting P&Ps if appropriate, based on the facts and circumstances of the incident, during *Terry* stops is itself facially unconstitutional.

C. Fingerprinting during a *Terry* stop without probable cause to arrest cannot be per se unreasonable because the United States Supreme Court has stated, without having the opportunity to rule definitively, that circumstances exist where the practice is reasonable.

In order for Appellants to prevail, they must prove that photographing and fingerprinting a suspect for whom reasonable suspicion, but not probable cause, of criminal activity exists is unconstitutional in every circumstance. Appellants may object, arguing that it is not the custom of fingerprinting during a *Terry* stop itself that is unconstitutional, but rather that the application of that custom to these particular Appellants was unconstitutional. Such an objection must fail for two reasons.

First, such an objection would convert Appellants' theory of liability from Avenue One liability to Avenue Three (failure to train), a theory of liability they specifically

disavowed. Second, were the Court to accept the argument, it would collapse *Monell* liabily into *respondeat superior*. Appellants argument would essential be: (1) but for the custom of conducting P&Ps if appropriate, based on the facts and circumstances of the incident, during *Terry* stops, Appellants would not have been subject to a P&P; (2) Appellants constitutional rights were violated by the application of the P&P; ergo (3) the City is liable under *Monell*. The United States Supreme Court long ago foreclosed the validity of such a theory of municipal liability.

> Obviously, if one retreats far enough from a constitutional violation some municipal "policy" can be identified behind almost any … harm inflicted by a municipal official; for example, [the defendant officer] would never have killed [the plaintiff] if Oklahoma City did not have a "policy" of establishing a police force. But *Monell* must be taken to require proof of a city policy different in kind from this latter example before a claim can be sent to a jury on the theory that a particular violation was "caused" by the municipal "policy."

City of Oklahoma v Tuttle, 471 US 808, 823; 105 S Ct 247; 85 L Ed 2d 791 (1985).

Appellants cannot establish that the City's custom of permitting P&Ps if appropriate, based on the facts and circumstances of the incident, during *Terry* stops will result in a constitutional tort every time the custom is applied because the United States Supreme Court has stated

> There is … support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch.

Hayes v Florida, 470 US 811, 816–17; 105 S Ct 1643; 84 L Ed 2d 705 (1985). Applying the reasoning of *Hayes*, there *must* exist circumstances in which the City's custom is permissible under the Fourth Amendment because the Court in *Hayes* described exactly the custom

Appellants are challenging. Therefore, Appellants cannot, as a matter of law, prevail on their *Monell* claim under Avenue One—the only theory of municipal liability they have asserted—because the custom at issue is not facially unconstitutional.

Rather, the causal relationship between the custom and the alleged injury, to the extent a causal relationship exists, is of the attenuated type the United States Supreme Court held could not give rise to municipal liability in *Tuttle*, 471 US at 873. The Court of Appeals therefore correctly determined in these cases that there is no municipal liability under *Monell* for any constitutional injury Appellants may have suffered as a result of the P&P, and this Court's review is not warranted even for error-correction, let alone for any of the grounds for review established in MCR 7.305(B).

D. Appellants' argument that the Court of Appeals decisions permit municipalities to shield themselves from *Monell* liability lacks merit and should not be credited.

Appellants argue that the Court of Appeals created a mechanism for municipalities to shield themselves from *Monell* liability by "couching" unconstitutional "official directives to its employees in non-mandatory terms." (App for Leave at 22.) Said another way, the Court of Appeals' decision was erroneous because it based its conclusion "on the fact that the challenged P&P policy did not *require* police officers to conduct P&Ps during field interrogations and stops." (*Id.* at 21.)

Appellants' contention that the decision of the Court of Appeals will allow "municipalities throughout the state" to "evade liability for policies that cause constitutional violations whenever they authorize, but don't require, officers or other municipal officials to engage in the unconstitutional conduct" (*Id.* at 24) is both logically self-defeating and unsupported by case law.

As discussed above, under *Monell* and its progeny, a municipal defendant is liable for the constitutional torts of its employees only if the municipality's official policy or custom is the "moving force" behind the constitutional injury. In Appellants' doomsday scenario, municipalities will adopt unconstitutional policies, such as permitting police officers to use deadly force against jaywalkers, and then shield themselves from *Monell* liability by adding language to the policy stating that the use of deadly force is within the officer's discretion.

Appellants' contention is logically self-defeating because as *Monell* itself teaches, the first application of an unconstitutional policy exposes a municipality to liability, irrespective of the municipal agent's discretion in applying the policy:

> The "policy" … that was challenged in *Monell* was a policy that by its terms compelled pregnant employees to take mandatory leaves of absence before such leaves were required for medical reasons; this policy in and of itself violated the constitutional rights of pregnant employees [.] Obviously, it *requires only one applications of a policy such as this* to satisfy fully *Monell*[.]

Tuttle, 471 US at 822 (emphasis added). Logically, even if the policy at issue in *Monell* had given supervisors of pregnant employees discretion not to impose mandatory leave, in each case where an employee *was* forced to take leave under the policy, each of those instances would result in a constitutional violation and in each case the municipality would be liable.

Appellants cite no authority for their proposition that municipal liability "does not depend on whether an individual officer acting pursuant to [a policy or custom] retains some level of discretion in deciding whether or not to engage in that conduct in a particular situation." (App for Leave at 17.) This is because no such authority exists. Rather, even under the cases Appellants cite in support of their argument, a police officer's discretion to act within the scope of an unconstitutional policy does not absolve the municipality of liability.

In *Garner v Memphis Police Dept*, 8 F3d 358 (CA 6, 1993), the city "had a policy authorizing use of deadly force when necessary to apprehend a fleeing burglary suspect." *Id.* at 364. The Sixth Circuit concluded that the plaintiff had established municipal liability because the police department had trained the officer "that is was proper to shoot a fleeing burglary suspect in order to prevent escape," *id.*, and that "[f]ar from failing to train their officers in the constitutional limitations on the use of deadly force defendants trained their officers to exceed these limitations." *Id.* at 366. Of no consequence to the court's analysis was the fact that a Memphis officer would always retain the discretion *not* to use deadly force on a fleeing burglary suspect.

Similarly, in *Stevens-Rucker v City of Coloumbus*, No. 2:14-cv-2319, 2017 WL 1021346, at *16 (SD Ohio March 16, 2017) an unpublished decision of the Southern District of Ohio, the court denied the city's motion for summary judgment on the *Monell* claim related to its policy of permitting officers to use lethal force against persons on the ground armed with knives so long as the officer felt threatened.. In reaching its conclusion, the court reasoned that the policy "invites an officer to *make an unconstitutional decision* to use lethal force on a person on the ground because the person is a threat—even if not an immediate one." *Id.* (emphasis added).

As evidenced by the outcome in *Stevens-Rucker*, it is possible for a court to conclude that an unconstitutional policy is the moving force behind a constitutional injury even when the officers have the discretion as to how to apply the policy, that is "to make an unconstitutional decision." Therefore, Appellants' fear that municipalities will be able to avert liability by deeming unconstitutional policies discretionary is ill-founded both in logic and in the law.

E. The Court of Appeals cannot as a matter of law define the scope of *Monell* liability less restrictively than the United States Supreme Court.

Assuming for the sake of argument that the Court of Appeals' published holding in Johnson's case does create a loophole in municipal liability, Appellants have still failed to establish grounds for this Court's review because the Michigan Court of Appeals cannot alter the scope of municipal liability for violations of the federal constitution. "In interpreting the *federal* constitution, state courts are not privileged to provide greater protections or restrictions when the Supreme Court of the United States has refrained from doing so." *J & J Const Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722, 731 n.9; 664 NW2d 728 (2003), citing *Arkansas v Sullivan,* 532 US 769, 772; 121 S Ct 1876; 149 L Ed 2d 994 (2001) (emphasis in original).

As argued more fully below, state courts are not empowered to provide more restrictive or more permissive interpretations of the federal constitution than the United States Supreme Court. It would be reversible error for a trial court of this state to rely on one outlier opinion authored by a State Court of Appeals. Therefore, even if Appellants' interpretation of the Court of Appeals' holding is accurate, they have still failed to establish grounds for this Court's review because there is no issue of significant public interest to be addressed.

Moreover, even if the Michigan Court of Appeals were empowered to alter the scope of *Monell* liability in the State of Michigan, the risk of adverse outcomes for other litigants is vanishingly remote. Since the turn of the 21st century, only four published Michigan Court of Appeals decision and only three Michigan Supreme Court decisions have cited *Monell* for any purpose. And in all seven cases, *Monell* was cited for a proposition of law *other* than municipal liability.

On the other hand, the United States District Courts for the Eastern and Western Districts of Michigan have published a combined 114 cases citing *Monell* in the same period of time. The Sixth Circuit has cited *Monell* in 39 published cases originating in Michigan. While not dispositive, these numbers are at least suggestive of the fact that the vast majority of municipal liability cases are being adjudicated in federal courts, where the Court of Appeals' decision in *Johnson* would be at most persuasive, but not binding.

For the foregoing reasons, Appellants have failed to establish either a clear error in the decision of the Court of Appeals, or an issue of significant public interest with respect to its holding on the issue of municipal liability. Indeed, as argued above the Court of Appeals reached the correct conclusion in these cases, and its holding will not adversely impact future litigants. This Court should deny leave to appeal with respect to municipal liability.

II. This Court is not permitted to decide whether fingerprinting is a Fourth Amendment search because it is a question of federal law the United States Supreme Court has refrained from answering.

As a general rule, state courts should not answer novel questions of federal constitutional law. However, that is exactly what Appellants are asking this Court to do with respect to the question of whether fingerprinting is a search under the Fourth Amendment. In the cases below, the Court of Appeals avoided the question because the case could be decided on other grounds: namely qualified immunity and lack of municipal liability.

Whether fingerprinting is a search under the Fourth Amendment subject to the warrant requirement or whether there are circumstances in which fingerprinting unsupported by probable cause is a question that the United States Supreme Court has declined to answer for nearly fifty years. The application of qualified immunity to this case—and Appellants' lack of objection to it—is telling. The courts below and the parties

apparently agree that the individual officers are entitled to qualified immunity—and thus that whether fingerprinting is a search is not "clearly established" law. By implication the parties also agree that the United States Supreme Court has refrained from deciding the issue.

Appellants attempt to cast this issue as a matter of significant public interest by arguing that the Court of Appeals dicta suggest that the court would come to the "wrong" conclusion about whether fingerprinting is a search. (App for Leave at 25–26.) However the Michigan Court of Appeals and this Court, like all state courts, are simply not the proper forum to determine an unresolved federal constitutional question, and this Court should deny Appellants' application with respect to this issue.

A. Appellants freely admit in their briefs that whether fingerprinting is a search under the Fourth Amendment is an open question the United States Supreme Court has not answered.

In arguing that fingerprinting is a search under the Fourth Amendment (App for Leave at 27–31), Appellants concede that the United States Supreme Court has refrained from deciding the question (*id.* at 27), and even summarize the leading Supreme Court cases discussing the likelihood that fingerprinting in the absence of probable cause *is* permissible. (*Id.* at 31–33.) While the City argued below that fingerprinting is *not* a search under the Fourth Amendment (Harrison Appellee Br at 16–19; Johnson Appellee Br at 19–23), the Court of Appeals declined to make a definitive holding, concluding instead that the individual officers were entitled to qualified immunity because the law with respect to whether fingerprinting is a search is not clearly established.

The parties are therefore in agreement that the question of whether fingerprinting is a search is one the United States Supreme Court has declined to answer. For the reasons that follow, this Court must also decline to answer the question.

B. When interpreting the federal constitution, state courts are not permitted to provide broader protections or restrictions when the United States Supreme Court has refrained from doing so.

"In interpreting the *federal* constitution, state courts are not privileged to provide greater protections or restrictions when the Supreme Court of the United States has refrained from doing so." *J & J Const Co*, 468 Mich at 731 n.9 (emphasis in original). Of course, when interpreting the Michigan Constitution, this Court is "'not bound by the United States Supreme Court's interpretation of the United States Constitution, even where the language is identical.'" *People v Tanner*, 496 Mich 199, 221; 853 NW2d 653 (2014), quoting *People v Goldston,* 470 Mich 523, 534; 682 NW2d 479 (2004).

Where, as here, a case is brought in state court under federal constitutional provisions, this Court may not apply stricter standards than the United States Supreme Court, even if this Court could do so under the Michigan Constitution.

> [A] State is free as a matter of its own law to impose greater restrictions [on] police activity than those this Court holds to be necessary upon federal constitutional standards. But, of course, a State may not impose such restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them.

Oregon v Hass, 420 US 714, 719; 95 S Ct 1215; 43 L Ed 2d 570 (1975) (internal citations omitted); *see also Sullivan*, 532 US at 772 ("The Arkansas Supreme Court's alternative holding, that it may interpret the United States Constitution to provide greater protection than this Court's own federal constitutional precedents provide, is foreclosed by *Oregon v. Hass*.")

A holding from this Court that police officers may not fingerprint an individual during the course of a *Terry* stop would be exactly of the type forbidden in *Haas* and *Sullivan.* As demonstrated in both Appellants' application for leave to appeal and the City's briefs in the Court of Appeals cases, the United States Supreme Court *has* refrained from imposing a restriction against taking fingerprints without a warrant or probable cause to confirm or dispel reasonable suspicion.

If anything, the United States Supreme Court has indicated that if the proper case were before it, it would hold that fingerprinting is *not* violative of the Fourth Amendment. *Davis v Mississippi*, 394 US 721, 728; 89 S Ct 1394; 22 L Ed 2d 676 (1969) ("We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest."); *Hayes*, 470 US at 816–17 ("None of the foregoing implies that a brief detention in the field for the purpose of fingerprinting, where there is only reasonable suspicion not amounting to probable cause, is necessarily impermissible under the Fourth Amendment."); *Hiibel v Sixth Judicial Dist Court of Nevada, Humboldt Co*, 542 US 177, 188; 124 S Ct 2451; 159 L Ed 2d 292 (2004).

Because the United States Supreme Court has refrained from imposing a restrictive reading of the Fourth Amendment by holding that fingerprinting is a search, this Court is prohibited from so holding. The Court must therefore deny the application for leave to appeal with respect to the question of whether fingerprinting is a search.

C. Fingerprinting a legally stopped suspect does not violate the Fourth Amendment

Even if this Court were to decide the issue, it would be left to conclude that taking a fingerprint in the course of a *Terry* stop does not violate the Fourth Amendment. A "Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v United States*, 533 US 27, 33; 121 S Ct 2038; 150 L Ed 2d 94 (2001). In delineating what expectations of privacy society will recognize as reasonable, the Supreme Court has stated, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. *Katz v United States*, 389 US 347, 351; 88 S Ct 507; 19 L Ed 2d 576 (1967) (internal citations omitted).

While not stated in case law categorically, fingerprinting fails to implicate the Fourth Amendment. In *Davis*, 394 US at 722–23 (1969) the petitioner was seized without probable cause or reasonable suspicion, transported 90 miles, and fingerprinted at a remote police station. The fingerprint evidence served as a basis for his indictment and subsequent conviction. *Id.* The Supreme Court held that the fingerprint evidence was inadmissible, because it was the fruit of an unlawful detention. *Id.* at 727. "Detentions for the sole purpose of obtaining fingerprints are … subject to the constraints of the Fourth Amendment." *Id.*

In so doing, however, the Court did not hold that fingerprinting itself is a Fourth Amendment event. Rather, the Court suggested that warrantless detentions for the purpose of obtaining fingerprints may "under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." *Id*. The Court reached this conclusion in part because, "Fingerprinting involves none

of the probing into an individual's private life and thoughts that marks an interrogation or search." *Id* at 727.

Revisiting *Davis*, the Court clarified its prior holding, noting "in *Davis* it was the initial seizure—the lawless dragnet detention—that violated the Fourth and Fourteenth Amendments, not the taking of fingerprints." *United States v Dionisio*, 410 US 1, 11; 93 S Ct 764, 770; 35 L Ed 2d 67 (1973). Going even further, the Court stated, "[a]s a result, the Court held in *Davis* that investigatory seizures for the purpose of obtaining fingerprints are subject to the Fourth Amendment *even though fingerprints themselves are not protected by that Amendment*." *Id.* at 39 (emphasis added). There can be no doubt, therefore, that the taking of fingerprints, in the absence of some other constitutional violation, does not implicate the Fourth Amendment at all.

The Court again explained its holding in *Davis* in *Hayes*, another transportation and fingerprinting case. The Court held that the police illegally seized defendant though coercion when they threatened to arrest him if he didn't accompany them to the police station for fingerprinting. *Hayes*, 470 US at 813-814. Again finding that the government's transportation of the defendant violated the Fourth Amendment, the Court went out of its way to state: "There is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch." *Id* at 817.

The key distinctions these cases make that Appellants fail to apprehend is that it was the *unlawful detention and transportation* of the petitioners in *Davis* and *Hayes* that rendered the

fingerprints inadmissible evidence. Where, as here Appellants were lawfully stopped, the taking of a thumbprint while on-scene is permissible. *Davis*, 394 US at 728. One can hardly imagine a more narrowly circumscribed procedure than an officer obtaining a fingerprint at the scene of the stop with a fingerprint card carried with him at all times.

D. Resolution of this question is unnecessary because no custom or practice of the City caused the alleged constitutional injury and the officers are entitled to qualified immunity.

This Court should decline review of this case with respect to whether fingerprinting is a search because it is prohibited from doing so. Even if considering the question was permissible, this Court should still refrain from resolving this issue because doing so is unnecessary to resolve the case. Appellants' have not challenged the Court of Appeals' determination that the individual officers' are entitled to qualified immunity. Nor could they, given the lack of clearly established law as to the Fourth Amendment nature of fingerprinting. Further, as argued above, even assuming Appellants suffered a constitutional injury, the City is not liable because no custom or practice actually caused the harm. Therefore, even if this Court were to hold that fingerprinting is a search, the outcome of the case would not change. The Court should therefore deny Appellants' application with respect to this issue.

III. Fingerprinting Appellants did not exceed the scope of the stops because in each case the fingerprinting was reasonably related to the mission of the stop.

The Court of Appeals did not address whether a P&P is outside the scope of a *Terry* stop because Appellants never raised the issue, and it should be deemed waived. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). Nevertheless, to the extent the Court considers the issue, leave should not be granted because (1) there is no "clearly erroneous"

Court of Appeals decision to correct; and (2) to the extent an issue of significant public interest exists, this case is a poor vehicle for resolution of it because whether a P&P is a search for Fourth Amendment purposes is an unsettled question of federal law.

A. Appellants' assertion that searches during *Terry* stops are limited to searches for weapons is legally inaccurate.

Appellants argue that *Terry* searches are limited only to searches for weapons for officer safety. (App for Leave at 33.) While it is true that the search at issue at *Terry* was a search for weapons, there is no general rule that a "search" under *Terry* is limited to one for weapons. A *Terry* stop must "justified at its inception and reasonably related in scope to the circumstances which justified the initial stop." *Hiibel*, 542 US at 188 (internal quotation omitted). "'[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop [and] the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion ...'" *Illinois v Caballes*, 543 US 405, 420; 125 S Ct 834; 160 L Ed 2d 842 (2005), quoting *Florida v Royer*, 460 US 491, 500; 103 S Ct 1319; 75 L Ed 2d 229 (1983) (plurality opinion). Stated another way, the investigative tool used by the officers must support the original mission of the stop and not prolong the interaction beyond the time reasonably required to complete the mission. *Rodriguez v United States*, ___ US ___, ___; 135 S Ct 1609, 1612, 191 L Ed 2d 492 (2015). The fact that United States Supreme Court cases contemplate the use of "investigative tools" beyond the stop itself shows that a *Terry* stop can include a limited search so long as the search is reasonably related to the mission of the stop.

Assuming *arguendo* that photographing and fingerprinting is a search, such a search conducted for the limited purpose of verifying identity and dispelling reasonable suspicion of connection with a crime based on specific, articulable facts is within the scope of a *Terry*

stop. Appellants first argue generally that a P&P was not justified to determine Appellants' identities, based on their faulty assumption that a *Terry* search can only be for weapons. (App for Leave at 33–35). This argument runs contrary to many United States Supreme Court cases.

> Our decisions make clear that questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops. See *United States v. Hensley,* 469 U.S. 221, 229, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985) ("[T]he ability to briefly stop [a suspect], ask questions, **or check identification** in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice"); *Hayes v. Florida,* 470 U.S. 811, 816, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985) ("[I]f there are articulable facts supporting a reasonable suspicion that a person has committed a criminal offense, that person may be **stopped in order to identify him**, to question him briefly, or to detain him briefly while attempting to obtain additional information"); *Adams v. Williams,* 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972) ("A brief stop of a suspicious individual, **in order to determine his identity** or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time").

Hiibel, 542 US at 186 (emphasis added). In the absence of identification, the officers in the individual cases below relied on the least intrusive means available to confirm Appellants' identities: a photograph and fingerprint. In each case, the P&P was well-within the scope of the *Terry* stop.

B. A de minimus intrusion to confirm or dispel suspicions is squarely within the scope of a *Terry* stop.

An officer may, without a warrant, stop a person for investigatory purposes when he has reasonable suspicion of criminal activity based upon specific, articulable facts that are known to him at the time of the stop. *Terry v Ohio*, 392 US 1, 27–28; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *Embody v Ward*, 695 F3d 577, 580 (CA 6, 2012). The scope of the stop and the extent of the intrusion must be 'reasonably related in scope to the circumstances which justified the interference.'" *Embody*, 695 F3d at 580. Officers must "diligently pursue[ ]

means of investigation that [are] likely to confirm or dispel their suspicions quickly." *United States v Sharpe,* 470 US 675, 686; 105 S Ct 1568; 84 L Ed 2d 605 (1985).

The reasonableness of an officer's suspicion is evaluated under the totality of the circumstances. *United States v Cortez*, 449 US 411, 417; 101 S Ct 690; 66 L Ed 2d 621 (1981). The officer must articulate more than general "suspicion or hunch," *United States v Harris*, 192 F3d 580, 584 (CA 6, 1999), but the court must credit inferences that officers draw from their experiences and specialized training that "might well elude an untrained person." *United States v Arvizu,* 534 US 266, 273; 122 S Ct 744; 151 L Ed 2d 740 (2002), citing *Cortez,* 449 U.S. at 417–418 (1981).

In both cases below, fingerprinting and photographing Appellants were de minimus intrusions that would confirm or dispel the officers' suspicions that Appellants were involved in the suspected crimes that justified their initial detentions.

1. VanderKooi's suspicion that Harrison was involved in the transportation of stolen goods was never dispelled, even though Aguilar corroborated his account.

The issue of whether the P&P was within the scope of a *Terry* stop was not presented to the Court of Appeals. But, the trial court in this case noted that a *Terry* stop of Harrison was justified by reasonable suspicion: "VanderKooi observed a suspicious exchange between two young men in an area and at a time of day when property crime rates were higher. Plaintiff then entered a park and exhibited strange behavior. Given the totality of the circumstances, reasonable suspicion existed to merit further investigation." (*Harrison* Tr Op at 7.) Under the totality of the circumstances, VanderKooi had reasonable suspicion to stop Harrison for involvement in the transportation of stolen goods and pursue investigatory techniques that would confirm or dispel that suspicion.

Although Aguilar confirmed Harrison's explanation of the exchange prior to Harrison's P&P, VanderKooi is free to disbelieve an assertion made by a suspect or his companions and independently confirm or dispel his suspicions. To conclude otherwise would undermine the entire rationale of *Terry* and its progeny. Indeed, *Terry*-style protective patdowns are justified in part by the fact that a suspect is apt to lie to a police officer about whether he is armed.

Harrison had no identification. The only corroboration of his story came from Aguilar—who did not have the firetruck with him anymore when the backup officers stopped him, another factor in the totality of the circumstances giving rise to ongoing reasonable suspicion. Further, other factors, such as the time of day, the location, and VanderKooi's knowledge of crime trends, persisted under the totality of the circumstances that gave rise to reasonable suspicion in the first place.

Contrary to Appellants' argument that VanderKooi's reasonable suspicion was already dispelled when he took Harrison's P&P, confirming Harrison's identity through a photograph and fingerprint was an eminently reasonable step to confirm or dispel VanderKooi's suspicions, and rationally related to the mission of the stop. The lower courts made no error in holding that even if a P&P is a Fourth Amendment search, it was within the scope of the stop in Harrison's case.

2. Johnson's fingerprints were taken to dispel Bargas' reasonable suspicion he had tried to open the locked, unattended cars a witness had seen him peering into.

Again, the issue of whether the P&P was within the scope of a *Terry* stop was not presented to the Court of Appeals. Johnson was stopped because he matched the description of, and was subsequently identified by a MAC employee and neighbor, as being a person that appeared be looking into car windows on that day in the MAC parking lot—

actions that were sufficiently suspicious to cause the MAC employee to call 911. It is undisputed that vehicles in the MAC parking lot had, in the time prior to this incident, been subjected to break-ins and theft, which crimes were, at the time of Johnson's stop, unsolved.

Looking at the facts in a light most favorable to Johnson, he did not match the description of at least one of the previous car burglars, however he did live in the neighborhood behind the parking lot, consistent with the flight-path of one of the suspects. Appellant also asserts that he was not looking into the car windows for items to steal, but rather was looking at his own reflection as he passed by. Nevertheless, reasonable suspicion to stop and investigate him existed because he matched the description provided *that day* by the MAC employee of a suspicious person looking into vehicles at a location where vehicles had been burglarized in the recent past.

Johnson had no identification on him at the time of the stop, and based on his stature and tattoos, appeared to be older than his stated age. Knowing of the previous burglaries, and in order to confirm or dispel his suspicions that Johnson was involved in those prior incidents, Bargas chose to photograph Johnson and take a set of fingerprints on the scene so that he could check Johnson against those suspects in the other vehicle burglaries.

Such a nonintrusive investigatory method falls well within the purpose of the stop, is the least intrusive means by which Bargas could confirm or dispel his suspicions, and is therefore reasonable under the Fourth Amendment. *Caballes*, 543 US at 420. Appellants' argument that VanderKooi and Bargas's reasonable suspicion should already have been dispelled because Johnson did not match the description of *one* of multiple suspects in the

car burglaries and because Johnson offered an alternate explanation for his behavior is without merit.

3. Appellants cite no authority for the proposition that retention of a photograph and print card is a Fourth Amendment event.

Appellants make the novel argument that the City's retention of their photo and print cards is an ongoing Fourth Amendment event. However, they cite no authority for this proposition, and the City has been unable to locate any independently. A party may not announce a position to the court without support in hopes that the Court will make his argument for him and find authority to support it. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). This issue should be therefore be considered abandoned.

C. Resolution of this question is unnecessary because no custom or practice of the City caused the alleged constitutional injury and the officers are entitled to qualified immunity.

This Court should decline review of this case with respect to whether the P&Ps were within the scope of the *Terry* stops because: (1) the Court of Appeals did not make a clearly erroneous decision with respect to this issue; (2) Appellants have failed to show that this is an issue of significant public interest. Indeed, Appellants argued this issue strictly in terms of the application of the law to the specific facts of this case. This Court should also refrain from resolving this issue because doing so is unnecessary to resolve the case.

Appellants' have not challenged the Court of Appeal determination that the individual officers' are entitled to qualified immunity. As argued above, even assuming Appellants suffered a constitutional injury, the City is not liable because no custom or practice actually caused the harm. Therefore, even if this Court were to hold that the P&Ps in this case exceeded the scope of the respective *Terry* stops, the outcome of the case would

not change. The Court should therefore deny Appellants' application with respect to this issue.

IV. Whether Harrison consented to being fingerprinted and photographed is an issue specific to his case and his case alone, and disturbing the holdings below would be mere error correction.

Appellants do not even pretend that the issue of whether Harrison gave valid consent to the P&P is one of significant public interest or that the Court of Appeals' decision is "clearly erroneous and will cause material injustice." Rather, Appellants present their argument regarding consent as if this Court were an error-correcting court, not a Court of last resort concerned with issues that will affect more than just the parties to the litigation. For these reasons, the Court should deny leave to appeal on the issue of Harrison's consent to the P&P.

A. Harrison asserts that this issue is rife with questions of material fact, making this case a poor vehicle for deciding any broader issues that may be present with respect to consent searched.

Appellants' opening paragraph on the issue of Harrison's consent shows clearly that the argument to be presented is solely about error-correction, and not any of the grounds for leave that Appellants must *establish* and not merely *name* or *list* under MCR 7.305(B).

> The trial court erred when it concluded that Harrison's consent was voluntary, and the Court of Appeals erred in not addressing this issue and not reversing the trial court on this point. There are genuine disputes of fact as to whether a reasonable observer would have viewed Harrison's consent as voluntary despite Harrison's mere acquiescence to authority, his personal characteristics including his age, and the evidence of duress.

(App for Leave at 38.)

Moreover, Appellants highlight what they perceive as many factual issues present that should have prevented the trial court from granting summary disposition in favor of Appellees:

- "whether a reasonable person would have understood the exchange to indicate consent cannot be answered against [Harrison] at summary disposition." (*Id.* at 39.)
- "there are disputes of fact as to what the police officers said to Harrison to elicit his response of 'okay[.]'" (*Id.*)
- "whether Harrison was under duress during the encounter is disputed." (*Id.* at 41.)

Therefore, even if Appellants had made an argument that the Court of Appeals holding was clearly erroneous or that this issue was of significant public interest, this case would be a poor vehicle for the Court to decide any of those issues because of underlying factual disputes. This Court should therefore deny leave to appeal.

B. Harrison has failed to assign any error to the Court of Appeals holding that could impact future litigants or that would result in material injustice to himself.

Moreover, even in the absence of alleged factual disputes, Harrison has failed to show that this case presents an issue of significant public interest or that the Court of Appeals holding was clearly erroneous. "A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Kitchen v Kitchen*, 465 Mich 654, 661–62; 641 NW2d 245 (2002). Harrison has failed to point out any clear error, but rather seeks to litigate—for the third time—whether he actually consented to the P&P. All he has pointed out is scattered authority that supports his position. (App for Leave at 38–42.) Of course any litigant can cite cases and make an argument that those cases support his position. But to demonstrate clear error on the part of a lower Court, a party must show not just that a different conclusion could have been reached, but that there was no rational way to come to the conclusion the Court did in fact reach. Harrison has failed to do so in this case.

Harrison has also failed to show how disturbing the lower court holdings would benefit anyone other than himself. Axiomatically, in order for a case to have significant public interest, the public must have some stake in its outcome. Here, even assuming Harrison is correct and the trial court did err, the only party who would benefit from correcting the error is him.

C. Even if this issue fell within the permissible grounds for review, the Court should deny leave to appeal because the trial court correctly concluded that Harrison consented to the P&P.

As Harrison points out, the Court of Appeals did not consider his arguments regarding consent because it was able to resolve the case on other grounds, namely qualified immunity. (App for Leave at 38; *Harrison*, slip op at *5.) Nonetheless, the trial court correctly concluded that Harrison did give consent to the search.

Valid consent must be voluntary: that is "unequivocal, specific, and freely and intelligently given." *Lavigne v Forshee*, 307 Mich App 530 at 538; 861 NW2d 635 (2014) (internal quotation omitted). The voluntary nature of consent is determined under the totality of the circumstances. *Schneckloth v Bustamonte*, 412 US 218 at 227; 93 S Ct 2041; 36 L Ed 2d 854 (1973) *Lavigne*, 307 Mich App at 538.

Voluntary consent can be given in "words, gesture, or conduct." *United States v Carter*, 378 F3d 584, 587 (CA 6, 2004). It cannot, however, be based in a mere "acquiescence to a claim of lawful authority." *Bumper v North Carolina*, 391 US 543, 548–49; 88 S Ct 1788; 20 L Ed 2d 797 (1968). Consent also cannot be the result of duress or coercion. *United States v Tillman*, 963 F2d 137, 143 (CA 6, 1992).

"If consent is freely given, it makes no difference that an officer may have approached the person with the hope or expectation of obtaining consent." *Kentucky v King*,

563 US 452, 463; 131 S Ct 1849; 179 L Ed 2d 865 (2011). The fact that most people will consent, even if they are not told they are free not to respond or consent, does not eliminate "the consensual nature of the response." *INS v Delgado*, 466 US 210, 216; 104 S Ct 1758; 80 L Ed 2d 247 (1984).

Consent may be limited in scope and also revoked. *People v Powell*, 199 Mich App 492, 496–99; 502 NW2d 353 (1993). The scope of consent is measured by objective reasonableness: what the typical reasonable person would have understood the exchange between the officer and citizen to be. *Florida v Jimeno*, 500 US 248, 251; 111 S Ct 1801; 114 L Ed 2d 297 (1991).

The trial court determined that Harrison voluntarily consented to the P&P because:

- Harrison was a 16-year-old with no evidence of lack of capacity or cognitive deficiency; (*Harrison* Tr Op at 10)
- The encounter was not lengthy; (*id.*)
- Harrison felt free to ask the officers questions; (*id.*)
- The officers reasonably believed Harrison's response of "okay" was consent to the P&P. (*Id.*)

As the trial court correctly concluded, at every step of the way in this case, Harrison consented to the contact and search. (*Id.* at 7 ("Both Plaintiff and Defendant cite to ample deposition testimony to this effect.").) When VanderKooi initially stopped to talk to him, VanderKooi asked to speak with him and he said "sure." After Harrison explained his story, which VanderKooi initially disbelieved, VanderKooi asked Harrison to "hold on" while other officers contacted Aguilar. Harrison agreed and they talked idly. VanderKooi asked if he could search Harrison's person and backpack. Harrison said yes. VanderKooi asked for

identification, which Harrison did not have. VanderKooi then asked if he could take a P&P. Harrison asked if he had done something illegal, and VanderKooi calmly responded that the P&P was to verify Harrison's identity and asked again for permission. Harrison replied, "okay."

A typical reasonable person would interpret the exchange between Harrison and VanderKooi to be free and consensual. Indeed courts have held that consent was valid in situations where officers acted in a much more coercive and forceful manner. In *United States v Drayton*, 536 US 194; 122 S Ct 2105; 153 L Ed 2d 242 (2002), plain clothed officers with visible weapons and badges boarded a bus. *Id.* at 197. One officer leaned over another passenger to speak with one of the respondents, getting 12 to 18 inches from his face and whispering, asking for permission to search his bag and person. *Id.* at 198. After finding contraband, the officers handcuffed him and asked for his companions consent to search him. Contraband was found on him too. The Court held the encounter to be consensual. *Id.* at 203–206.

In this case, it appears to a reasonable observer that Harrison gave his free and voluntary consent throughout his entire encounter with VanderKooi, including the P&P procedure. Harrison adduced no evidence in the trial court other than a self-serving affidavit he filed attempting to "correct" his deposition testimony to make it seem as though he was merely acquiescing to VanderKooi's authority. The trial court correctly rejected the document as a sham affidavit attempting to contradict "ample" testimony from Harrison's deposition which established this was a consensual interaction. (*Harrison* Trial Op, 7, 10-11 *citing Kaufman & Payton C v Nikkila*, 200 Mich App 250, 257; 503 NW2d 728 (1993).)

Therefore, in addition to the fact that Harrison has failed to establish any grounds for this Court's review under MCR 7.305(B), there is no error for this Court to correct, and it should decline to grant the application for leave to appeal.

D. Resolution of this question is unnecessary because no custom or practice of the City caused the alleged constitutional injury and the officers are entitled to qualified immunity.

In addition to the foregoing, this Court should decline review of this case with respect to whether Harrison consented to the P&P because doing so is unnecessary to resolve the case. Harrison has not challenged the Court of Appeal determination that the individual officers' are entitled to qualified immunity. Even assuming Harrison did not give valid consent and did suffer a constitutional injury, the City is not liable because no custom or practice actually caused the harm. Therefore, even if this Court were to hold that the courts below erred in determining Harrison consented to the P&P, the outcome of the case would not change. The Court should therefore deny Appellants' application with respect to this issue.

CONCLUSION AND RELIEF REQUESTED

The issues raised by the Appellants in this case are not issues of significant public concern. The Court of Appeals has not created a loophole for municipal liability in section 1983 actions. Indeed, it cannot because state courts do not have the authority to contravene the United States Supreme Court's formulation of federal constitutional protections. Neither have Appellants shown that the Court of Appeals decision is clearly erroneous, such that this Court should act as an error-correcting court.

Any remaining issues Appellants have raised for this Court's review could only possibly affect Appellants, not other litigants in this state. Because Appellants have failed to

establish any grounds for this Court's review under MCR 7.305(B), Appellees request this Court deny the application for leave to appeal.

Dated: August 2, 2017

By: */s/ Elliot J. Gruszka*

ELLIOT J. GRUSZKA (P77117)
Assistant City Attorney
Attorney for Defendants-Appellees

Business Address:
300 Monroe Ave. NW, Ste. 620
Grand Rapids, MI 49503
(616) 456-3181
(616) 456-4569 FAX
egruszka@grcity.us